

No. 12418

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

GEORGE T. GOGGIN, Receiver in Bankruptcy of the Estate
of EXETER REFINING COMPANY,

Appellee.

APPELLANT'S OPENING BRIEF.

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Appellee.

APPELLANT'S OPENING BRIEF.

I.

Preliminary Jurisdictional Statement.

Exeter Refining Company, a California corporation (hereinafter referred to as "Exeter"), filed its Petition under Chapter XI of the Bankruptcy Act with the District Court of the United States, for the Southern District of California, Central Division, on the 16th day of October, 1947 [Tr. 2-12], the United States District Court as a court of bankruptcy having jurisdiction of this matter pursuant to the Act of July 1, 1898, as amended. (Chapter 541, Sections 1 and 2, 30 Stat. 544, 545, as amended; United States Code, Title XI, Chapter 1, Section 1, and Chapter 2, Section 11.) On the same day said Petition was

approved by the Honorable Jacob Weinberger, Judge of said Court, and the matter referred to Benno M. Brink, Esq., one of the Referees in Bankruptcy of said Court. [Tr. 12, 13.] Thereafter, and within the time provided by law, the State Board of Equalization of the State of California duly filed its Proof of Claim for California Sales and Use Taxes in the sum of \$3,926.36, plus interest in the sum of \$17.52 for each month or fraction thereof after February 29, 1948, to date of payment, plus an additional penalty in the sum of \$350.30 if payment were not made by March 7, 1948. [Tr. 16.]

On March 6, 1948, appellee Receiver filed Objection to Claim Filed by State Board of Equalization in the Sum of \$3,926.36 and Notice of Hearing. [Tr. 13-14.] On December 2, 1948, the Referee below filed Findings of Fact, Conclusions of Law and an Order sustaining the objections of appellee Receiver to the claim of the California State Board of Equalization for penalties in the sums of \$293.48 and \$350.30, and allowing the balance of the claim in full. [Tr. 15-19.] On December 10, 1948, appellant filed a Petition for Extension of Time Within Which to File Petition for Review of Referee's Order. [Tr. 20-21.] On the same day the Referee below filed his Order extending appellant's time within which to file its Petition for Review to and including January 11, 1949. [Tr. 22.] Appellant's Petition to review the aforesaid Order of the Referee sustaining appellee Receiver's objection to the claim of appellant for penalties in the sums of \$293.48 and \$350.30 was thereafter duly filed by appellant

on January 11, 1949. [Tr. 22-31.] On February 8, 1949, the Referee below filed his Certificate on Petition for Review of Order re Claim of State Board of Equalization, said Certificate being addressed to the Honorable Leon R. Yankwich, Judge of the District Court. [Tr. 32-36.] On June 22, 1949, the Honorable Leon R. Yankwich, Judge of the United States District Court, Southern District of California, Central Division, filed a Memorandum Decision affirming the Order of the Referee below, formal Order to follow. [Tr. 36-37.] On October 21, 1949, the formal Order of Judge on Petition for Review of Referee's Order was duly entered and filed. [Tr. 38.]

Within the time allowed by law, and in accord with the Rules of this court, appellant filed its Notice of Appeal from the Order of the Honorable Leon R. Yankwich affirming the Order of the Referee below [Tr. 39]; Undertaking for Costs on Appeal [Tr. 39-42]; Appellant's Designation of Record on Appeal [Tr. 42-43]; Statements of Points Upon Which Appellant Intends to Rely [Tr. 53-55]; and Appellant's Designation of Record to be Printed. [Tr. 56.]

The jurisdiction of the Court of Appeals is invoked pursuant to Sections 24 and 25 of the Bankruptcy Act (Act of July, 1898, as amended, Chapter 541, Secs. 24, 25; 30 Stat. 533, as amended; U. S. Code, Title XI, Chap. 4, Secs. 47 and 48). Appellate jurisdiction in this matter vested in the Court of Appeals upon the filing on November 15, 1949, of the Notice of Appeal, the amount involved being in excess of \$500.00.

II.

Statement of the Case.

This appeal is from an Order of the District Court dated and entered October 21, 1949, affirming the Order of the Referee in Bankruptcy dated and filed December 2, 1948.

The facts in this case are succinctly set forth in the Referee's Certificate on Appellant's Petition for Review and are set forth at this point solely for the convenience of the Court. As outlined in that Certificate, Exeter filed its Petition under Chapter XI of the Bankruptcy Act on October 16, 1947. The Petition was approved that day and the matter referred to the Referee below. On October 17, 1947, George T. Goggin was appointed and qualified as Receiver in Bankruptcy of Exeter's estate. [Tr. 15, 32.] As the duly appointed Receiver in Bankruptcy, appellee had authority to operate the business of the debtor and did so. [Tr. 32.] In the course of the proceeding, prior to March 6, 1948, and within the time provided by law, appellant duly filed its proof of claim for taxes, interest and penalties due under the California Sales and Use Tax Law in the amount of \$3,926.36, plus additional interest in the sum of \$17.52 for each month or fraction thereof after February 29, 1948, to date of payment, plus an additional penalty in the sum of \$350.30 if payment of the aforesaid taxes, penalties and interest were not made by appellee to appellant by March 7, 1948. [Tr. 16, 33.] Appellee, however, did not make payment of the aforesaid taxes, interest and penalties included in the sum of \$3,926.36 by March 7, 1948 [Tr. 16, 33.] To the contrary, on March 6, 1948, appellee Receiver filed objections not only to the penalties included in the aforesaid claim for \$3,926.36 but also to the penalty in the sum of \$350.30.

As of March 7, 1948, a plan of arrangement under Chapter XI of the Bankruptcy Act had not as yet been approved or passed upon by the District Court [Tr. 17] although subsequent to that date a plan of arrangement providing for an extension as well as a composition was duly confirmed [Tr. 32-33] and appellee did pay to appellant the aforesaid tax principal and interest.

No question relating to the allowance of tax principal or interest is present in this appeal. [Tr. 33.]

The penalties included in appellant's claim for \$3,926.36 amounted to \$341.38 and consisted of two penalty items, namely, \$47.54 and \$293.48 [Tr. 14, 33], and it is apparent, therefore, that three penalty items were in fact originally objected to by appellee. The nature of each penalty item may succinctly be described as follows:

First Penalty Item Amounting to \$47.54: This penalty was assessed by appellant pursuant to the provisions of Section 6511 of the Revenue and Taxation Code (Sales and Use Tax Law) of the State of California for Exeter's failure to file sales tax returns which were due prior to the commencement of the instant Chapter XI proceedings. [Tr. 16, 33.]

Second Penalty Item Amounting to \$293.48: This penalty was assessed by appellant pursuant to the provisions of Section 6511 of the Revenue and Taxation Code (Sales and Use Tax Law) of the State of California for failure to file sales tax returns for the period July 1, 1947, to October 16, 1947, the date of the commencement of the instant Chapter XI proceedings, said returns being due subsequent to October 17, 1947, the date appellee, George T. Goggin, was duly appointed and qualified as Receiver of Exeter's estate. [Tr. 16, 33.]

Third Penalty Item Amounting to \$350.30: This penalty was assessed by appellant pursuant to the provisions of Section 6565 of the Revenue and Taxation Code (Sales and Use Tax Law) of the State of California, and is attributable to appellee's failure to pay the sum of \$3,926.36, plus interest, by March 7, 1948, as required by appellant's Notice of Determination under the California Sales and Use Tax Law dated February 6, 1948. [Tr. 16, 17, 34.]

The Referee below allowed the first penalty item amounting to \$47.54 as a general unsecured debt to be paid by the debtor under the extension provisions of its confirmed plan of arrangement pursuant to the provisions of Section 307 of Chapter XI of the Bankruptcy Act, and his ruling in that respect was affirmed by the Order of the Honorable Leon R. Yankwich dated October 21, 1949, and is not involved in this appeal. [Tr. 17, 34, 36-37, 38.]

The second and third penalty items were disallowed by the Referee and his ruling in that respect was affirmed by the Order of the Honorable Leon R. Yankwich filed and entered October 21, 1949. [Tr. 17-19, 34, 36-38.] This appeal is taken from the Order of the District Court affirming the Referee's disallowance of the second and third penalty items referred to above.

III.

Specification of Errors.

1. The penalty items of \$293.48 and \$350.30 for failure to file sales tax returns and make timely payment of amounts due under the California Sales and Use Tax Law, respectively, should have been allowed as expenses of administration inasmuch as both the filing of said returns and payments of amounts due under the California Sales and Use Tax Law were not required until subsequent to the appellee Receiver's appointment and qualification. Being attributable to omissions on the part of appellee Receiver, said penalties should have been allowed as proper claims against and obligations of appellee Receiver pursuant to the provisions of 28 U. S. C. A., Section 960.

2. In any event, said penalty items should have been allowed as contingent claims pursuant to Section 307 of Chapter XI of the Bankruptcy Act as debts to be extended.

IV.

Pertinent Statutory Provisions.

"For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of $2\frac{1}{2}$ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this State on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of $2\frac{1}{2}$ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter."

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6051.

“The taxes imposed by this part are due and payable to the board quarterly on or before the last day of the month next succeeding each quarterly period.”

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6451.

“On or before the last day of the month following each quarterly period of three months, a return for the preceding quarterly period shall be filed with the board in such form as the board may prescribe.

“For purposes of the sales tax a return shall be filed by every seller. For purposes of the use tax a return shall be filed by every retailer maintaining a place of business in the State and by every person purchasing tangible personal property, the storage, use, or other consumption of which is subject to the use tax, who has not paid the use tax due to a retailer required to collect the tax. Returns shall be signed by the person required to file the return or by his duly authorized agent but need not be verified by oath.”

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6452.

“The board for good cause may extend for not to exceed one month the time for making any return or paying any amount required to be paid under this part. The extension may be granted at any time provided a request therefor is filed with the board within or prior to the period for which the extension may be granted.

“Any person to whom an extension is granted shall pay, in addition to the tax, interest at the rate of one-half of 1 per cent per month, or fraction thereof, from the date on which the tax would have been due without the extension until the date of payment.”

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6459.

“If any person fails to make a return, the board shall make an estimate of the amount of the gross receipts of the person, or, as the case may be, of the amount of the total sales price of tangible personal property sold or purchased by the person, the storage, use, or other consumption of which in this State is subject to the use tax. The estimate shall be made for the period or periods in respect to which the person failed to make a return and shall be based upon any information which is in the board’s possession or may come in its possession. Upon the basis of this estimate the board shall compute and determine the amount required to be paid to the State, adding to the sum thus arrived at a penalty equal to 10 per cent thereof. One or more determinations may be made for one or for more than one period.”

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6511, Art. 3, Chap. 5, Part I, Division 2.

“Any person against whom a determination is made under Articles 2 or 3 of this chapter or any person directly interested may petition for a redetermination within 30 days after service upon the person of notice thereof. If a petition for redetermination is not filed within the 30-day period, the determination becomes final at the expiration of the period.”

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6561.

“All determinations made by the board under Articles 2 or 3 of this chapter are due and payable at the time they become final. If they are not paid when due and payable, a penalty of 10 per cent of the

amount of the determination, exclusive of interest and penalties, shall be added thereto.”

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6565.

“Unless inconsistent with the context and for the purposes of an arrangement *providing for an extension* of time for payment of debts in full and applicable exclusively to the debts to be extended—

(1) ‘creditors’ shall include the holders of all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under section 63 of this Act and whether liquidated or unliquidated, fixed or contingent; and

(2) ‘debts’ or ‘claims’ shall include all unsecured debts, demands, or claims *of whatever character* against a debtor, whether or not provable as debts under section 63 of this Act and whether liquidated or unliquidated, fixed or *contingent.*” (Emphasis added.)

Bankruptcy Act, Section 307.

“Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion; *Provided, however,* That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that

it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act.”

Bankruptcy Act, Section 57d.

“Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.”

Bankruptcy Act, Section 57j.

“A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.”

28 U. S. C. A., Section 959b.

“Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.”

28 U. S. C. A., Section 960.

ARGUMENT.

A.

The Appellee Receiver Was Under a Duty to File California Sales and Use Tax Law Returns and Make Timely Payment of Taxes Due Under That Law in the Same Manner as the Debtor Would Have Been Required to Do if These Proceedings Under Chapter XI of the Bankruptcy Act Had Not Been Commenced.

Reference to 28 U. S. C. A., Section 959b, makes it clear that any receiver appointed in any court of the United States is under a duty to manage and operate the property in his possession as such receiver according to the requirements of the valid laws of the State in which the property is situated in the same manner that the owner thereof would be bound to do if still in possession.

In the instant case, reference to the provisions of the California Sales and Use Tax Law set forth above discloses that Exeter was under a duty to file returns for the period July 1, 1947, to October 16, 1947, and make timely payment of the taxes due for that period under the California Sales and Use Tax Law. If Exeter had not filed returns for that period nor made timely payment of the taxes due, Exeter would clearly have been liable for the penalties here in question. This being the case, appellee Receiver stands in Exeter's shoes and is similarly liable for his delinquency in filing and making timely payment.

Inasmuch as Exeter's property would have been subject to attachment and sale on execution to satisfy the liability

for the penalties here in question if Exeter had retained possession, it is submitted that the property remains subject to that charge in the hands of appellee.

B.

As an Officer of a United States Court Conducting a Business Under Authority of That Court Appellee Receiver Was Required to Comply With State Taxing Provisions and is Subject to the Imposition of Duly Imposed Penalties for Failure to Do So.

It is clear in the instant case that appellee Receiver did operate the business of the debtor under authorization of the District Court. [Tr. 32.] This being so, he was subject to all State taxes applicable to that business to the same extent as if it were conducted by an individual or a corporation. (28 U. S. C. A., Section 960.)

There is no question but that if Exeter had conducted its business after October 17, 1947, the date appellee was duly appointed and qualified [Tr. 15, 32], Exeter would have been required to file returns for the period July 1, 1947, to October 16, 1947, and make timely payment of taxes attributable to that period. If Exeter had not filed those returns and made such payment within the time required by law the penalties here in question would have been imposed.

It is appellant's contention that these penalties are, accordingly, properly imposed upon appellee Receiver and allowable in these proceedings as an expense of his ad-

ministration of Exeter's estate. Appellee Receiver had actual knowledge that the \$350.30 penalty item would be imposed if he failed to act and he is charged with knowledge of the statutory requirement for timely filing of returns.

Thomson v. Toman (C. C. A. 7), 119 F. 2d 971;

Boteler v. Ingels, 308 U. S. 57, 521, 60 S. Ct. 29;

Palmer v. Webster, etc., 312 U. S. 156, 61 S. Ct. 542, 44 Am. B. R. (N. S.) 662;

State of California v. Hisey (C. C. A. 9), 84 F. 2d 802, 805;

Laugharn v. Carter, 19 Cal. 2d 454;

In re Knox-Powell-Stockton Co., 100 F. 2d 979, 983.

C.

In Any Event the Penalties in Question Should Have Been Allowed as Contingent Debts Within the Purview of Section 307 of the Bankruptcy Act.

Section 307 of the Bankruptcy Act (11 U. S. C. A., Sec. 707), clearly provides that the term "debts" or "claims" as used in Chapter XI and applicable exclusively to debts to be extended includes all unsecured debts, demands or claims *of whatever character* against the debtor *whether or not provable* under Section 63 of the Bankruptcy Act, regardless of whether the debts or claims are liquidated or unliquidated, *fixed or contingent*.

It is appellant's position that the penalties here involved were contingent debts of Exeter at the time these proceedings were commenced. That this is so, is clearly evidenced by the nature of the tax involved and the manner in which the penalty is computed. As reference to the California Sales and Use Tax Law discloses, the California sales tax is imposed upon retailers for the privilege of selling tangible personal property at retail, the tax amounting to $2\frac{1}{2}$ per cent (during the period in question) of the gross receipts derived by the retailer from those sales. It is obvious, therefore, that the tax principal for the period July 1, 1947, to October 16, 1947, could have been ascertained simply by taking from Exeter's books the figure disclosing total receipts from sales of tangible personal property at retail and multiplying by $2\frac{1}{2}$ per cent. The penalty imposed for failure to file returns disclosing the tax computed as aforesaid could have been computed upon the commencement of the instant Chapter XI proceedings by merely taking 10 per cent of the aforesaid tax principal. The penalty imposed for failure to pay the aforesaid tax and penalty, as well as the additional interest accruing at the statutory rate of one-half of one per cent per month or fraction thereof on the tax principal only, could likewise have been ascertained at the commencement of these proceedings merely by the application of simple arithmetic. Taking these facts into consideration, it is submitted that appellant's claim for the penalties involved is squarely within the definition of "debts" as contained in Section 307 of the Bankruptcy Act and should have been allowed

pursuant to that section under the extension provision of Exeter's plan of arrangement.

Foust v. Munson S.S. Line (C. C. A. 2), 80 F. 2d 859;

Foust v. Munson S.S. Line, 299 U. S. 77, 32 Am. B. R. (N. S.) 171;

American Service Co. v. Henderson (C. C. A. 4), 120 F. 2d 525;

Hippodrome Bldg. Co. v. Irving Trust Co. (C. C. A. 2), 91 F. 2d 753, 34 Am. B. R. (N. S.) 633, 637.

It is to be noted that the 1938 amendment of the Bankruptcy Act provides in Section 63a(8) that contingent debts are provable and allowable, and in 57d that unliquidated or contingent claims are not allowable only if not capable of liquidation or reasonable estimation in a reasonable time. In the instant case the penalty items, always certain in amount, became a certain liability on March 7, 1948.

It is appellant's contention that the foregoing sections (57d, 63a(8) and 307), especially the definition of "debts" in Section 307 as including debts of whatever character, whether provable or not, compel the conclusion that the instant penalty items should have been allowed as debts to be extended under Exeter's plan of arrangement.

D.

Section 57j of the Bankruptcy Act Does Not Preclude the Allowance of Penalties in Chapter XI Proceedings.

It is immediately apparent from the foregoing that the broad definition of “debts” contained in Section 307 of the Bankruptcy Act is inconsistent with the provisions of Section 57j of the Act, which provides, in short, that penalties owing to a State are not allowable. This inconsistency being present, reference must be made to Section 302 of the Bankruptcy Act to determine which of the foregoing sections shall govern the penalties claimed in this proceeding, inasmuch as Section 302 specifically purports to dispose of problems raised by inconsistencies between provisions governing Chapter XI proceedings and straight bankruptcies.

Since Section 302 provides simply that Chapters I to VII of the Bankruptcy Act (Section 57j being found in Chapter VI), shall apply to Chapter XI proceedings only insofar as those chapters are not inconsistent with or in conflict with the provisions of Chapter XI, it is appellant’s position that Section 57j is not applicable in Chapter XI proceedings involving an extension arrangement in whole or in part and that the only issue present regarding the allowance of the penalties under consideration as debts to be extended is whether they are debts within the meaning of Section 307.

Conclusion.

It is submitted that the Order of the Court below was erroneous; that the objection of appellee Receiver to the allowance of the penalties claimed by appellant should be overruled; and that appellee Receiver should be directed to pay said penalties to appellant Board of Equalization of the State of California as an expense of administration or, in the alternative, as a debt to be extended under the extension provisions of Exeter's plan of arrangement.

Respectfully submitted,

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